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10 UNITED STATES OF AMERICA  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

13 UNITED STATES OF AMERICA, ) **Case No.** CR-07-00457-RMW  
14 Plaintiff, )  
15 v. ) APPLICATION OF THE UNITED  
16 MICHAEL WAYNE GAITHER, ) STATES FOR A PRELIMINARY ORDER  
17 Defendant. ) OF FORFEITURE  
18

19 The United States of America, by and through the undersigned Assistant United States  
20 Attorneys, respectfully submit this Application of the United States for Issuance of a Preliminary  
21 Order of Forfeiture in the above-captioned case. In support thereof, the United States sets forth  
22 the following:

23 On July 18, 2007, defendant Michael Wayne Gaither was charged by indictment with  
24 violations of Title 18, United States Code, Section 922(g)(1) (felon in possession of a firearm  
25 and ammunition). The indictment also sought criminal forfeiture, pursuant to Title 18, United  
26 States Code, Section 924(d), of:

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1 a. a Mosin Nagant, Model M44, 7.62 x 54rmm caliber rifle, serial number M44018448;  
2 and  
3 b. 32 rounds of 7.62 of 7.62 x 54rmm caliber ammunition

4 (hereinafter "subject property").

5 On October 1, 2007, defendant, Michael Wayne Gaither, pled guilty to a violation of Title  
6 18, United States Code, Section 922(g)(1), and agreed to forfeit to the United States, all of his  
7 right, title and interest in the subject property.

8 Rule 32.2 (b)(1) of the Federal Rules of Criminal Procedure provides that as soon as  
9 practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any  
10 count in an indictment or information with regard to which criminal forfeiture is sought, the court  
11 shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of  
12 specific property is sought, the court shall determine whether the government has established the  
13 requisite nexus between the property and the offense. If the government seeks a personal money  
14 judgment against the defendant, the court shall determine the amount of money that the  
15 defendant will be ordered to pay. The court's determination may be based on evidence already in  
16 the record, including any written plea agreement or, if the forfeiture is contested, on evidence or  
17 information presented by the parties at a hearing after the verdict or finding of guilt.

18 Pursuant to Rule 32.2(b)(2), if the court finds that property is subject to forfeiture, it shall  
19 promptly enter a preliminary order of forfeiture setting forth the amount of any money  
20 judgment or directing the forfeiture of specific property without regard to any third party's  
21 interest in all or part of it. Determining whether a third party has such an interest shall be  
22 deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

23 Rule 32.2(b)(3) further provides that the entry of a preliminary order of forfeiture  
24 authorizes the Attorney General (or a designee) to seize the specific property subject to  
25 forfeiture; to conduct any discovery the court considers proper in identifying, locating, or  
26 disposing of the property; and to commence proceedings that comply with any statutes governing  
27 third-party rights. At sentencing - or at any time before sentencing if the defendant consents - the  
28 order of forfeiture becomes final as to the defendant and shall be made part of the sentence and

1 included in the judgment. The court may include in the order of forfeiture conditions  
2 reasonably necessary to preserve the property's value pending any appeal.

3 The United States has established the requisite nexus between the subject property and  
4 the offense to which the defendant pled guilty. Pursuant to the provisions of Title 18, United  
5 States Code, Sections 924(d), any and all right, title, and interest that the defendant holds in the  
6 aforesaid property is forfeitable to the United States.

7 Upon the issuance of a Preliminary Order of Forfeiture and pursuant to Title 21, United  
8 States Code, Section 853(n), the United States will publish at least once for three successive  
9 weeks in a newspaper of general circulation, notice of this Order, notice of its intent to dispose of  
10 the property in such manner as the Attorney General may direct and notice that any person, other  
11 than the defendant, having or claiming a legal interest in the property must file a petition with the  
12 Court and serve a copy on Hanley Chew, Assistant United States Attorney, or Stephanie M.  
13 Hinds, Assistant United States Attorney, within thirty (30) days of the final publication of notice  
14 or of receipt of actual notice, whichever is earlier. This notice shall state that the petition shall be  
15 for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be  
16 signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the  
17 petitioner's right, title or interest in the forfeited property and any additional facts supporting the  
18 petitioner's claim and the relief sought. The United States may also, to the extent practicable,  
19 provide direct written notice to any person known to have alleged an interest in the property that  
20 is the subject of the Preliminary Order of Forfeiture, as a substitute for published notice as to  
21 those persons so notified.

22 WHEREFORE, the United States respectfully requests that this Court enter a Preliminary  
23 Order of Forfeiture which provides for the following:

24 a. authorizes the forfeiture of the subject property to the United States;  
25 b. directs the United States, through its appropriate agency, to seize the forfeited  
26 property forthwith; and  
27 c. directs the United States to publish at least once for three successive weeks in a  
28 newspaper of general circulation, notice of this Order, notice of the government's intent to

1 dispose of the property in such manner as the Attorney General may direct and provide notice  
2 that any person, other than the defendants, having or claiming a legal interest in the property  
3 must file a petition with the Court and serve a copy on government counsel within thirty (30)  
4 days of the final publication of notice or of receipt of actual notice, whichever is earlier.

5 Dated: 11/21/07

Respectfully submitted,

6 SCOTT N. SCHOOLS  
7 United States Attorney

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9 HANLEY CHEW  
10 STEPHANIE M. HINDS  
11 Assistant United States Attorneys

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